STATE OF MICHIGAN

COURT OF APPEALS

LAURA TURNER,

Plaintiff-Appellant,

v

DR. CHARLES F. MUNK, SR., CHARLES F. MUNK D.D.S., P.C., and PROFESSIONAL CENTER L.L.C.,

Defendants-Appellees.

UNPUBLISHED
November 21, 2006

No. 270532
Oakland Circuit Court
LC No. 2005-066131-CD

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

In this suit involving a claim for wrongful discharge, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

Plaintiff was the office manager for defendant Dr. Charles F. Munk's dental practice from 1998 until her termination in February 2004.[1] As the office manager, plaintiff had significant responsibilities and control over the operations of the business. Plaintiff was entrusted with defendant's signature stamp, which she could use to issue company checks and sign official correspondence in his name, a company credit card, control of the petty cash fund, and was responsible for calculating and issuing payroll checks for the staff. In addition, plaintiff also performed some duties related to the management of the property owned by Professional Center, L.L.C. Plaintiff's status and responsibilities remained unchanged until July 2003, when defendant's son Dr. Charles W. Munk joined the practice.

At his deposition, defendant testified that, prior to his son joining the practice, he had had "total trust" in plaintiff. He explained that, as a solo practitioner with a very busy practice, he was completely occupied with handling the "operatory" segment of the business and had to rely

[1] For ease of reference, we shall use "defendant" to refer to defendant Dr. Charles F. Munk individually.

on his staff to handle the reception and business segment of the practice. However, he noted that this system changed when his son joined the practice.

Defendant testified that his son wanted to be more involved in running the business and wanted to change the "laissez-faire, good ol' boy way that I ran the office." He explained that his son wanted to implement written office policies and make changes to the way the business was handled. He further stated that plaintiff did not embrace the suggested changes. One change implemented shortly after his son joined the practice was the discontinuance of the use of the signature stamp. Although plaintiff still prepared the payroll checks, the checks now had to be approved and signed by one of the doctors.

In August 2003, plaintiff submitted some checks to defendant's son, which included her payroll check and the payroll check for a lab technician by the name of Kim Gannaway. Plaintiff testified that defendant's son questioned the large amount of overtime included in these payroll checks. Plaintiff stated that she told him that normally they do not incur overtime, but because of a recent power outage, she and Gannaway had to work extra hours. Plaintiff testified that defendant's son told her that his dad said, "we didn't pay overtime." Plaintiff stated that the doctors decided to hold the checks until they could consult with their lawyers and accountants. Plaintiff described the incident as "heated" and stated that afterwards the atmosphere at the office changed dramatically.

Defendant described the incident differently. He stated that he and his son were signing checks when his son noted that the checks for plaintiff and Gannaway had significant overtime. He said that he told his son, "no, no, we don't – overtime has to be authorized." He further stated that he mentioned that plaintiff had told him that nobody around the office was getting overtime. Defendant said that he then asked plaintiff to come in and explain the overtime. He testified that plaintiff initially denied that the checks contained overtime and that she said, "[w]e don't give overtime unless it's preauthorized." However, he testified that she eventually acknowledged that the checks contained overtime. He further testified that, after he told her that he was going to hold her check until he could talk to his accountant, she demanded the check and became argumentative and aggressive. The checks were eventually paid as prepared by plaintiff. After this incident, defendant began to pay plaintiff for the hours she spent working as property manger on a Form 1099 rather than on the professional corporation's payroll account.

Defendant testified that, a few months after this incident, he became increasingly aware of problems with plaintiff. He testified that he began to notice missing office property, such as the poinsettias purchased to decorate the office, cases of bottled water, decorations and the alcohol left over from the Christmas party, which he typically divided among all the staff. He also stated that other staff members informed him that plaintiff had removed a VCR/Monitor and an iron from the office, which the staff members believed belonged to the practice.

At his deposition, defendant's son stated that he and his father created an office manual during their vacation over the Christmas break in 2003. Defendant's son further stated that, during the discussions concerning the practice, he and his father began to talk about incidents involving plaintiff. Defendant's son testified that they decided to document them in an "incident log." Defendant stated that he and his son held a staff meeting in the first week of January where they distributed the new manual and issued a memorandum explaining that changes were being made and requesting each staff member to write a description of their job, state any potential

changes they would like to see and critique their own and the other staff members' job performance. Defendant testified that plaintiff refused to participate in the critique of the other staff members' job performance. Defendant stated that these critiques were collected at the end of January 2004 and that he and his son discussed them over another working vacation. Defendant testified that, after reviewing the documents and discussing options for plaintiff, he and his son decided to terminate plaintiff's employment.

Defendant testified that in early February 2004, he had a meeting with plaintiff where he explained to her that there were some questions he had concerning missing property, inappropriate behavior and other areas and that, because of these things, he had decided to terminate her employment. Defendant said he also gave plaintiff a release agreement wherein he offered to pay plaintiff $3,000 over a period of six weeks in exchange for plaintiff's release of any and all claims against defendants and her agreement to train her replacement. Plaintiff refused to sign the release.

Defendant testified that, after plaintiff's termination, some of his staff came to him with evidence that plaintiff misused the company credit card and may have paid for personal items with company funds. Defendant testified that, because of this evidence and his concerns about the missing company property, he authorized one of his staff members to lodge a complaint with the police. However, ultimately no charges were filed.

In May 2005, plaintiff sued defendants. Plaintiff alleged one count of statutory malicious prosecution, one count of common law malicious prosecution and one count of retaliatory discharge in contravention of public policy. In her retaliatory discharge claim, plaintiff alleged that defendants terminated her employment because she exercised her statutorily granted right to be paid overtime. See MCL 408.384a(1).

In March 2006, defendants moved for summary disposition of all plaintiff's claims under MCR 2.116(C)(10). In May 2006, the trial court issued an opinion and order granting defendants' motion.[2] With regard to plaintiff's claim of retaliatory discharge, the trial court concluded that plaintiff had failed to establish her prima facie case. Specifically, the trial court noted that the temporal proximity of plaintiff's termination to the overtime dispute was insufficient to establish causation. In addition, the trial court stated that, even if plaintiff had established a prima facie case, defendants articulated legitimate reasons for plaintiff's termination, which plaintiff has failed to rebut. Plaintiff appealed as of right.

In her only claim of error on appeal, plaintiff argues that she presented sufficient evidence to create a question of fact for the jury as to her claim of retaliatory discharge in contravention of public policy. Therefore, she further argues, the trial court erred when it granted defendants' motion for summary disposition of this claim. We disagree.

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[2] Plaintiff has not appealed the grant of summary disposition as to her malicious prosecution claims.

This Court reviews de novo the trial court's decision to grant summary disposition. *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Cawood v Rainbow Rehabilitation Centers, Inc*, 269 Mich App 116, 119; 711 NW2d 754 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When determining whether there is a genuine issue regarding any material fact, this Court will consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 153; 721 NW2d 233 (2006). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

"Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998) (opinion of Weaver, J.). "However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Suchodolski v Mich Consolidated Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982). Courts have recognized that there is an implied prohibition on "retaliatory discharges when the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment." *Id.* at 696.

> In *Suchodolski*, our Supreme Court recognized three situations where the discharge is so contrary to public policy as to be actionable though the employment is at will. The three public policy exceptions to the at-will doctrine apply when (1) the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty, (2) the employee is discharged for the failure or refusal to violate the law in the course of employment, and (3) the employee is discharged for exercising a right conferred by a well-established legislative enactment. [*Edelberg v Leco Corp*, 236 Mich App 177, 180; 599 NW2d 785 (1999), citing *Suchodolski, supra* at 695-696.]

In the present case, plaintiff relies on the third prong. In order to prevail under this claim, plaintiff must establish 1) the existence of a right conferred by a well-established legislative enactment, 2) that she exercised the right conferred, 3) that she suffered an adverse employment action and 3) a causal link between the adverse employment action and her exercise of the right conferred. See *Clifford v Cactus Drilling Corp*, 419 Mich 356, 368-369; 353 NW2d 469 (1984) (Williams, C.J., dissenting); *Suchodolski, supra* at 695-696. Plaintiff contends that she was discharged from employment for exercising her right under MCL 408.384a(1) to be paid overtime. It is undisputed that plaintiff had a dispute in August 2003 with defendants concerning

the payment of overtime. It is also undisputed that plaintiff was discharged by defendant. However, even if we were to assume that MCL 408.384a(1) confers a right capable of supporting plaintiff's common law retaliatory discharge claim,[3] we conclude that plaintiff has not presented sufficient evidence to create a question of fact regarding the causal link between her discharge and her alleged exercise of any right conferred by MCL 408.384a(1).

In order to establish causation, plaintiff must present evidence that her engagement in protected activity was a significant factor in the decision to terminate her employment. *Goins v Ford Motor Co*, 131 Mich App 185, 197; 347 NW2d 184 (1983); *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). Further, it is well-established that something more than a temporal connection is necessary to show causation. *West*, *supra* at 186.

Plaintiff contends that she presented sufficient evidence of a causal link between her discharge and her exercise of the right to be paid overtime. In support of this contention, plaintiff notes that both she and Gannaway testified that the mood in the office changed after the incident involving overtime. At her deposition, plaintiff testified that she thought the overtime issue was the cause of her discharge because "everything had been going along fine until then, and then after that, it was definitely a different atmosphere or different attitude in the office." Similarly, Gannaway testified that,

> We just felt things were really coming down after the overtime issue. I can't tell you how night and day different it was. It really was absolutely – he wouldn't talk to either one of us. He wouldn't schedule the lunches to explain things. And you felt like any day you were going to be axed and especially with the new policy coming out. I mean, I know everybody's at will but, you know, when that came out, it was, like, you can quit, you know, we can fire you any day we want, da-da-da-da. It was very heavy policy.

Despite plaintiff's contention that the mood changed only after the overtime incident, she testified that she had an immediate personality conflict with defendant's son even before the incident. Plaintiff also testified that, sometime between defendant's two working vacations, defendant took her out on a friendly lunch during which he explained that his son would not need her in the same capacity and that her job duties would be changing. Furthermore, at her deposition, plaintiff was asked if there was "ever any time in the last 2 months of your employment where you doubted that you would have continued employment?" To which she responded, "No." Likewise, although Gannaway testified that the mood changed after the overtime incident, she also noted that the promulgation of new policies played a significant role in this process. Hence, the overtime incident was not the only factor affecting the mood at the office. Plaintiff also acknowledged that defendant continued to pay overtime even after the overtime incident.

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[3] Because it is not necessary for resolution of this case, we decline to address defendants' argument that plaintiff cannot maintain her common law claim because there are alternate applicable statutory remedies. See *Dudewicz v Norris-Scmid*, 443 Mich 68, 80; 503 NW2d 645 (1993).

Taken in the light most favorable to plaintiff, the testimony concerning the mood at the office does not establish a causal link between the overtime incident and defendant's decision to terminate plaintiff more than three months later. This testimony does indicate that the relationship between plaintiff and defendant was strained to some degree by the overtime incident. However, it does not permit an inference that any adverse employment action taken after the incident was motivated by a desire to retaliate against plaintiff for exercising her statutory right to enhanced pay for overtime hours.

Plaintiff also points to her deposition testimony wherein she indicated that, after the overtime incident, defendant "continually" made comments concerning overtime. These comments, plaintiff argues, are evidence that defendant was ultimately motivated by plaintiff's assertion of her right to overtime. At her deposition plaintiff testified that,

> Well, [defendant] would just ask, Am I paying overtime this week? And, you know, Remember I don't want to pay overtime . . . . I mean, I knew he didn't want to pay overtime. I tried to comply. I stayed under 40 hours all but 3 weeks all of the rest of the year, and I felt anybody who worked overtime should be paid overtime.

This testimony supports an inference that defendant was concerned about the number of hours that plaintiff was working and that his concern was motivated by his desire to avoid having to pay overtime. However, it does not establish that defendant harbored a desire to retaliate against plaintiff for her previous demand to be paid overtime. Cf. *Henry v Detroit*, 234 Mich App 405, 414; 594 NW2d 107 (1999). Likewise, when asked how many times defendant made such comments over the three month period between the overtime incident and her termination, plaintiff answered, "[a] couple." Hence, plaintiff's characterization of these statements as having been "continually" made is inaccurate.

In her brief on appeal, plaintiff also states that, "[a]fter the overtime issue was raised, [plaintiff's] keys were taken away, individual Sam's Club memberships were revoked, the stamp signature was taken away, and her power to purchase office supplies was revoked." These acts, plaintiff argues, further implicate the overtime issue as the true cause of plaintiff's discharge. We do not agree. First, the record reveals that the signature stamp was removed shortly after defendant's son began working at the practice and could not, therefore, be in retaliation for the overtime incident. In addition, Gannaway testified that the Sam's Club memberships were taken away from every employee, not just plaintiff, and that this occurred "right towards the end." Likewise, Gannaway testified that plaintiff's keys were taken at the end of plaintiff's employment and may even have been taken on the same day that she was fired, which is hardly an unusual occurrence. Finally, although plaintiff claims that her power to purchase office supplies was revoked, there is no record evidence in support of this claim. It is, however, clear from plaintiff's deposition testimony that she was still making purchases for the office as late as December 2003, which was several months after the overtime incident. Consequently, none of these actions by defendant permit an inference that defendant engaged in retaliatory conduct towards plaintiff as a result of the overtime incident. See *id.* (noting that comments concerning the plaintiff's engagement in protected activity coupled with a change in the employer's treatment of the plaintiff created a question of fact for the jury on causation).

Taken as a whole and in the light most favorable to plaintiff, the proffered evidence is insufficient to establish a causal link between defendant's decision to terminate plaintiff and the earlier dispute over the payment of overtime. Therefore, summary disposition in favor of defendants was appropriate.

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski